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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: SEP 2 8 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a veterinary clinic. It seeks to employ the beneficiary permanently in the United States as a veterinary assistant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the alien employment certification did not require the beneficiary to possess an advanced degree or its equivalent and that the beneficiary did meet the job qualifications stated on the alien employment certification. Specifically, the director determined that the alien employment certification required the beneficiary to possess a bachelor's degree in veterinary science or equine science without any progressive years of experience and that the alien employment certification required the beneficiary to possess a "D.V.M." (Doctor of Veterinary Medicine).

On appeal, prior counsel argues that the beneficiary's degree from Mexico is equivalent to "a doctor's degree."[2] However, prior counsel failed to submit any documentary evidence supporting his assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). Counsel further argues that the alien employment certification did not require the beneficiary to be licensed as a DVM, and counsel submitted a letter from [redacted] General Counsel for the Texas Board of Veterinary Medical Examiners, who stated that "there is no testing, certification, registration, or licensing required by the State of Texas as a prerequisite for employment as a veterinary assistant or technician."

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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[1] After March 28, 2005, the correct form to apply for alien employment certification is the Form ETA 9089.

[2] [redacted]P.C. originally filed Form I-290B, Notice of Appeal or Motion, on behalf of the petitioner.

I. Initial Evidence and Translations

The regulation at 8 C.F.R. § 204.5(k) requires:

> (3) *Initial Evidence.* The petitioner must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.
>
> > (i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
> >
> > > (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
> > >
> > > (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

While not addressed by the director in his decision, the record of proceeding reflects that the petitioner submitted a purported foreign language transcript from the Universidad Autónoma de Tamaulipas in Mexico. However, the petitioner failed to submit a translation of the foreign language document, let alone a certified translation, pursuant to the regulation at 8 C.F.R. § 103.2(b) reflecting that "[a]ny document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate." Although the petitioner submitted an evaluation of the beneficiary's academic credentials from Dr. [redacted] Director for Foreign Credentials Service of America, who indicated that that he reviewed "an original transcript and photocopies of a degree" and stated that the petitioner's degree is "comparable to a bachelor's degree in the United States," the petitioner failed to submit a translation of the transcript. Moreover, the record of proceeding fails to reflect that the petitioner submitted the degree that was referred to by Dr. [redacted] in his letter. Therefore, the petitioner failed to demonstrate that the beneficiary is a professional holding an advanced degree pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(k)(3).

Furthermore, the regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. In the case here, as the petitioner submitted the beneficiary's purported transcript and Dr. [redacted] indicated the existence of

the beneficiary's foreign degree, which Dr. [redacted] equates to a bachelor's degree, the record of proceeding clearly reflects that primary evidence does exist. As such, Dr. [redacted] advisory opinion letter cannot be considered as evidence of the beneficiary's foreign degree. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988); *Matter of Sea, Inc.,* 19 I&N Dec. 817, 820 (Comm'r 1988).

Because the petitioner failed to submit sufficient documentary evidence establishing that the beneficiary has any foreign degree, let alone a foreign equivalent degree to a United States bachelor's degree, the beneficiary does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

II. Qualifications for the Job Offered

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.) While the director failed to cite this regulation, it provides the legal basis for his ultimate conclusion.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984).

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien employment certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Bachlor [sic] Degree/Veterinary Science or Equine Science
Major Field of Study: None

Experience: Zero years in job offered or related occupation.

Block 15: No other special requirements

In addition, Part B, "Statement of Qualification of Alien," line 13, of the alien employment certification reflects that the beneficiary claims a "D.V.M." license. As such, the alien employment certification did not require the beneficiary to possess a DVM for the proffered position. Instead, the beneficiary claimed only that he possessed the DVM license as a special qualification or skill. Therefore, the AAO withdraws the findings of the director for this issue.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

Thus, where experience is not a consideration, the minimum education is a U.S. degree above that of a baccalaureate of the foreign equivalent. The petitioner indicated that only a bachelor's degree was required. Thus, the position does not require a member of the professions holding an advanced degree. For this reason alone, the petition may not be approved.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(g)(2) provides in pertinent part:

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A review of the record of proceeding reflects that the petitioner submitted compiled statements of assets, liabilities, and equity for the period ending on December 31, 2006. However, the petitioner failed to submit annual reports, federal tax returns, or audited financial statements as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(2)(g). Therefore, the petitioner failed to establish that it has the ability to pay the proffered wage.

III. Request for Reclassification

On appeal, prior counsel requested USCIS to reclassify the beneficiary as a professional pursuant to section 203(b)(3) of the Act. However, a petitioner may not make material changes to a petition after adjudication in order to establish eligibility. Additionally, the Act prohibits USCIS from providing a petitioner with multiple adjudications for a single petition with a single fee.

The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on July 26, 2007. The petitioner checked box "d" under Part 2 of the petition requesting to classify the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability. The petitioner also signed Form I-140 under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct." The director adjudicated the petition based on the petitioner's request to classify the beneficiary as a member of the professions holding an advanced degree. On appeal, the petitioner is precluded from requesting a change of classification. A request for a change of classification will not be entertained for a petition that has already been adjudicated. A post-adjudication alteration of the requested visa classification constitutes a material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). In addition, the Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for Form I-140 covered the cost of the director's adjudication of the petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.[3] If the petitioner now seeks to classify the beneficiary as a professional pursuant to section 203(b)(3) of the Act, then it must file a separate Form I-140 requesting the new classification. On appeal, prior counsel has cited no statute, regulation, or standing precedent that permits a petitioner to change the classification of a petition once a decision has been rendered by the director.

IV. Conclusion

[3] *See* http://www.whitehouse.gov/omb/circulars/a025/a025.html, accessed on August 31, 2011, and incorporated into the record of proceeding.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.